Supreme Court, U.S.
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No. 99-6

In the

Supreme Court of the United States

A.S. GOLDMEN & COMPANY, INC.

Petitioner

v.

NEW JERSEY BUREAU OF SECURITIES

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Court of Appeals for the Third Circuit correct in finding that the registration provisions of the Uniform Securities Act, which have been adopted by New Jersey as well as 34 other states, and which are part of a national system of complementary federal and state regulation, do not raise impermissible barriers to interstate commerce?

2. Was the Court of Appeals for the Third Circuit correct in finding that New Jersey's registration requirement for securities sold from Petitioner's New Jersey office did not constitute the regulation of activities wholly conducted out-of-state and that the benefit of requiring the registration of securities sold from New Jersey outweighed any incidental burden on interstate commerce?

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STATEMENT OF THE CASE

1. Federal Regulatory System

Over 80 years ago, the first general securities law was passed to provide government oversight of the disclosure of information in the offering of securities. Pet. App. 4a. The purpose of such oversight and disclosure was to protect common investors against misleading or unscrupulous sales practices in transactions involving considerable financial risk. Between 1911 and 1933, almost every state had passed such "blue-sky" legislation.[1] By the Stock Market Crash of 1929 and the start of the Great Depression, considerable concern over the sale and marketing of these investment opportunities had been generated. In direct response to the Crash, Congress passed first the Securities Exchange Act of 1933, 15 U.S.C. §77a *et seq*, and then the Securities Act of 1934, 15 U.S.C. §78a *et seq*. These Acts were later supplemented with the Investment Company Act of 1940, 15 U.S.C. §80a-1 *et seq*, and the Investment Advisors Act of 1940, 15 U.S.C. §80b-1 *et seq*.

The federal statutes generally provided for registration of securities, disclosure of accurate and complete information, regulation of the securities markets and establishment of the Securities and Exchange Commission ("SEC"). The registration of securities with the SEC, however, does not include a merit review or constitute approval by that federal

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[1] Securities laws passed by the states have been referred to as "blue-sky laws" because they pertain to "speculative schemes which have no more basis than so many feet of blue sky...." [79A CGS Securities Regulation §366 n.13]

agency. In each of the federal statutes, Congress expressly recognized the complementary nature of the federal scheme with the existing state blue-sky laws by specifically not preempting the jurisdiction of the states. See §18 of 1933 Act, 15 U.S.C. § 77r; §28 of 1934 Act, 15 U.S.C. §78bb; §50 of Investment Company Act, 15 U.S.C. § 80a-49 and §222(a) of Investment Advisors Act, 15 U.S.C. § 80b-18a.

Congress recently amended certain provisions of the 1933 Act through the National Securities Market Improvement Act of 1996, P.L. 104-290, 110 Stat. 3416 (10/11/96) ("NSMIA"). NSMIA exempts from state registration requirements certain classes of securities that have already met a more demanding level of standards and criteria for listing in the marketplace. "Covered securities" under NSMIA include those listed on the New York Stock Exchange, the American Stock Exchange and the Nasdaq National Market. 15 U.S.C. § 77r(b). State governments generally retain authority to regulate securities not listed on the national exchanges, including small, regional, or intrastate securities offerings, and offerings that have fewer indicia of stability or reliability, including the offering which is the subject of this case. *See*, 15 U.S.C. §77r. States also retain authority to bring actions pursuant to State laws and regulations prohibiting fraud and deceit. See House Committee on Commerce Report on the National Securities Market Improvement Act of 1996, H.R.Rep. No.104-622 at 16(1996), 1996 U.S.C.C.A.N. p.3878. States do this by requiring filings and fees for the non-covered securities. 15 U.S.C. §77r(c). Thus, the intent and effect of federal securities law has been to permit the exercise of state jurisdiction over the initial public offering of certain smaller stock issues, such as those at issue here, and to facilitate coordinated and complementary state and federal regulation.

2. State Regulation

Subsequent to the enactment of the original federal securities legislation, consideration was given to the benefits of a more uniform approach to state securities laws. Over several years, these efforts resulted in the adoption of the Uniform Securities Act in 1956 by the National Conference of Commissioners on Uniform State Laws. The Uniform Securities Act was subsequently approved by the American Bar Association and approved in principle by the North American Securities Administrators Association. It was also endorsed by the SEC:

> [T]he Commissioners unanimously concur in the principle of uniformity of laws among the states with respect to the control of securities markets. With this principle in mind, the Commission has unanimously endorsed the proposed legislation. It is hoped that its enactment by the states will bring about a better integration of the work of state securities administrators with the work of the Securities and Exchange Commission.
> [Loss & Seligman, *Securities Regulation*, (Little, Brown 1989) at 48 n. 54]

The Uniform Securities Act has been adopted in 35 jurisdictions. In New Jersey, the Uniform Securities Law was passed in 1967 and enacted into law almost all of the Uniform Securities Act's provisions. N.J.S.A. 49:3-47 to 76. The New Jersey statute was recently amended to, among other things, conform the statute to NSMIA. Section 60 of the New Jersey statute, which is challenged in this appeal, prohibits the sale of securities in New Jersey unless they are (1) exempt from regulation; (2) registered under the New Jersey Uniform

Securities Law; or (3) a "covered security" under federal law. N.J.S.A. 49:3-60. Section 51 of the New Jersey Uniform Securities Law, which was based on section 414 of the Uniform Act, sets forth the scope of the Law, including Section 60's registration requirement. N.J.S.A. 49:3-51. That section provides that the registration requirements apply:

> (a) ... to persons who sell or offer to sell when (1) an offer to sell is made in this State, or (2) an offer to buy is made or accepted in this State;
>
> * * *
>
> (c) For the purpose of this section, except to the extent the bureau chief may by rule or order determine, an offer to sell or to buy is made in this State, whether or not either party is then present in this State, when the offer (1) originates from this State or (2) is directed by the offeror to this State and received at the place to which it is directed (or at any post office in this State in the case of a mailed offer); ....

The scope of New Jersey's regulation is nothing new. New Jersey has prohibited the fraudulent sales of securities not only within the State but into other states "from within this state" since 1931, well before its first adoption of the legislative format. *See Stevens v. Home Brewery, Inc.*, 112 N.J.Eq. 513, 516, 164 A. 903 (1933). As the Third Circuit recognized, requiring the registration of securities firms selling from New Jersey helps to "prevent this state from being used as a base of operations for crooks marauding outside the state." Pet. App. 17a (quoting *Stevens v. Wrigley Pharma. Co.*, 154 A. 403, 403 (N.J. Ch. Div. 1931)).

In New Jersey, the registration process is generally accomplished in one of two ways, depending on the type of security offered and the degree of reliability of the issuer. If a registration statement has been filed with the SEC for a security, the sale of that security may be registered in New Jersey "by coordination," which involves filing with the Bureau essentially the same papers that were filed with the SEC. N.J.S.A. 49:3-61.1. If no registration statement has been filed with the SEC, the security is registered in New Jersey "by qualification," which requires filing a more detailed registration statement with the Bureau including information that would otherwise have been provided in the federal form. N.J.S.A. 49:3-61. A registration statement must be filed with the Bureau and made effective before the securities can be sold. N.J.S.A. 49:3-61.

3. Imatec's Public Offering

This litigation concerns the sale of unregistered securities by securities broker-dealer A.S. Goldmen ("Goldmen") from its New Jersey office. Pet. App. 6a - 7a. On October 29, 1996, Goldmen commenced a public offering of securities of Imatec, Ltd. ("Imatec") from New Jersey even though the Imatec offering had neither been registered with the Bureau nor qualified for an exemption from registration pursuant to Section 60 of the New Jersey Uniform Securities Law. N.J.S.A. 49:3-60. Pet. App. 8a.

Imatec is a development-stage company which had earned only nominal revenues. As of December 31, 1995 and August 31, 1996 it had an accumulated deficit of $1,250,109 and $2,837,005 respectively. Pet. App. 136a. In order to raise needed capital, on May 13, 1996, Imatec filed a registration statement with the SEC. Pet. App. 7a, 136a. As required by law, Imatec filed an application on May 21, 1996 with the

Bureau to register the offering in New Jersey. Pet. App. 7a, 137a. The application listed Goldmen as the sole underwriter. Pet. App. 7a, 137a. The prospectus also set forth that the securities were "being offered by the Underwriter" which means that the offer was being made on a firm commitment basis by Goldmen. Pet. App. 7a. Goldmen actually would own the shares being offered to the public rather than only holding them forth on behalf of Imatec.

At the time the Bureau received Imatec's application, it had already commenced an investigation of Goldmen. Pet. App. 7a, 137a. During that investigation, it had discovered that Goldmen's business was concentrated in underwriting the public offerings of a handful of low priced, over-the-counter securities and then selling those securities in the secondary market. Pet. App. 7a, 137a. Because of Imatec's questionable financial condition and Goldmen's business practices, the Bureau was concerned that the Imatec securities were a type of risky investment associated with illegal practices including manipulation, illegal markups and failure to disclose risk factors. Pet. App. 7a, 137a.[2] The Bureau was also concerned that if it permitted Goldmen to sell the Imatec securities from New Jersey to out-of-state customers, then, because there is no filing requirement for transactions in the secondary market, Goldmen could evade Bureau scrutiny of sales to customers in New Jersey by (1) selling the public offering to cooperating

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[2] Since the issuance of the Third Circuit's decision in this case, allegations of fraud have been made against Goldmen by the Securities and Exchange Commission and the State of New York. The SEC issued an Administrative Order against Goldmen on July 7, 1999. *IMO A.S. Goldmen & Co., et al.*, Administrative Proceeding, File No. 3-9933. In addition, on July 8, 1999 the District Attorney for New York County issued an indictment against A.S. Goldmen and various individual defendants. *The People of the State of New York v. A.S. Goldmen*. The 240 count indictment includes a count related to the sale of Imatec stock.

out-of-state customers; (2) repurchasing those securities from the cooperating out-of-state customers; and then (3) reselling those securities to customers in New Jersey on the secondary market. Pet. App. 137a. The most effective way to prevent such a scheme is to require every public offering of low priced securities that is sold from New Jersey to be subject to New Jersey's securities registration requirement. Pet. App. 19a.

As part of the application process, the Bureau advised Goldmen's counsel that it needed additional information because of concerns about Imatec's financial condition and would therefore be considering the issuance of a stop order. Pet. App. 7a, 138a. By letter dated August 7, 1996, the underwriter asked the Bureau to refrain from entering a stop order. Pet. App. 138a. However, rather than proceeding with the registration process and providing the requested information, Goldmen requested permission, by letter dated August 8, 1996, to withdraw Imatec's application to register the Imatec securities. Pet. App. 138a. In the same letter, it was represented that: (a) "[t]here have been no offers or sales made in your state, nor will there be any offers or sales made in your state relating to this offering unless otherwise registered or an exemption from registration is available;" and (b) "the company will consent not to sell any of its securities under any of the non-issuer exemptions provided for under N.J.S.A. 49:3-50(b)." Pet. App. 138a. On August 13, 1996, the Bureau granted Imatec's request for withdrawal. Pet. App. 138a. On October 23, 1996, the Bureau executed a consent order with Imatec that incorporated the representations made in the August 8, 1996 letter. Pet. App. 8a, 138a.

On October 28, 1996, the registration that Imatec had filed with the SEC became effective. Pet. App. 8a, 140a. Goldmen began selling the offering of Imatec securities from its office in New Jersey to out-of-state customers the next

morning and sold the entire offering by 3:00 p.m. Pet. App. 8a, 140a. The prospectus associated with the public offering did not disclose that the Imatec securities were not registered in New Jersey or that Imatec had signed the Consent Order. Pet. App. 140a. After the offering was sold out, Goldmen continued to buy and sell Imatec securities on the interdealer market from its New Jersey office. Pet. App. 8a. On November 8, 1996, the Bureau learned that Goldmen was selling Imatec from New Jersey and advised Goldmen that any further sales of Imatec's securities from New Jersey would constitute willful violations of the New Jersey Uniform Securities Law and the Consent Order and would subject Goldmen to civil, criminal or administrative penalties. Pet. App. 9a, 141a. The Bureau also advised that it would issue a cease and desist order on the next business day. Pet. App. 9a, 141a. Goldmen responded that it intended to continue selling Imatec securities from New Jersey. Pet. App. 9a, 141a.

On November 12, 1996, Goldmen commenced a declaratory judgment action in the United States District Court for the District of New Jersey seeking a ruling that neither Section 60 nor the Consent Order prohibited it from selling securities that are not qualified for sale in New Jersey to residents in states where the securities have been registered, or a ruling that the application of Section 60 to its circumstances violated the Commerce Clause . Pet. App. 9a.

On November 13, 1996, Goldmen served the Bureau with an order to show cause why temporary and preliminary injunctive relief should not be granted prohibiting application of Section 60 to the sale of Imatec securities from New Jersey. Also on November 13, 1996, the Bureau served Goldmen with an administrative Order to Cease and Desist from "the solicitation of customers, offers and sale of Imatec in and from the State of New Jersey to any member of the public." Pet.

App. 9a. The Cease and Desist Order did not bar Goldmen from engaging in transactions in Imatec securities with broker-dealers or financial institutions and was not intended to bar Goldmen from engaging in unsolicited transactions in Imatec securities with the public. Pet. App. 9a. Its sole purpose was to prevent Goldmen from soliciting public, noninstitutional customers to buy or sell Imatec securities from its New Jersey office.

On November 14, 1996, the district court signed a temporary restraining order which stayed the Bureau from enforcing the Cease and Desist Order or taking any other action "that prohibits A.S. Goldmen from the solicitation, offer and sale of Imatec securities to or from persons residing outside of New Jersey." On November 20, 1996, the district court held that Goldmen had satisfied the requirements for a preliminary injunction and continued the stay that it had issued on November 14, 1996. Pet. App. 9a-10a.

The full merits of the federal complaint were later heard on cross-motions for summary judgment . Pet. App. 10a. After briefing and argument, on August 22, 1997, the district court entered final judgment in this matter in favor of Goldmen and ruled that the application of Section 60 to sales of securities solicited from New Jersey brokers to non-New Jersey customers effected an unconstitutional projection of New Jersey's securities regulations onto other states in violation of the Commerce Clause. Pet. App. 10a. The district court held alternatively that Section 60 violated the Commerce Clause under the balancing test announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), because New Jersey's interests were legitimate but "insubstantial". Pet. App. 10a. The court found significant that the Bureau was not asserting any allegations of fraud against

Goldmen as of the date of its attempted registration or the preliminary injunction hearing. Pet. App. 10a.

The Court of Appeals for the Third Circuit reversed the District Court on appeal. The court ruled that New Jersey's registration requirement did not violate the Commerce Clause. The court found that the provision did not constitute "extraterritorial regulation" by the state because the activities regulated did not occur wholly outside the state. Pet. App. 16a. With respect to New Jersey's regulation of its half of Goldmen's interstate transaction, the court found that the regulation advanced a substantial state interest and did not unduly burden interstate commerce. Pet. App. 18a-19a. Judge McKee dissented, expressing his view that absent specific proof of fraud, the burden of the regulation on interstate commerce outweighed its benefit to New Jersey. Pet. App. 30a.

ARGUMENT

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS NOR ISSUE OF SIGNIFICANT PUBLIC IMPORTANCE THAT REQUIRES THIS COURT TO REVIEW THE DECISION BELOW.

This case involves a provision of the Uniform Securities Act, which has been adopted in 35 states, establishing a registration procedure for certain securities. The regulation of the securities covered by this provision was left to the states by federal legislation. While petitioner claims that the future of the Commerce Clause is at issue, the fact remains that the provision challenged is long-standing, commonplace, and entirely consistent with both federal law and the Commerce Clause. There is, in short, no issue raised that requires the court's intervention.

Petitioner has not demonstrated any conflict among the lower courts addressing the issues decided by the Third Circuit. Petitioner relies on a single decision by an intermediate appellate court in Arizona, a state that has not adopted the Uniform Act. *See, Arizona Corporation Commission v. Media Products, Inc.*, 158 Ariz. 463, 763 P.2d 527 (Ariz. App. 1988). Moreover, unlike the transaction in this case, *Media Products* involved a transaction in which both the offer and acceptance occurred outside the regulating state. 763 P.2d at 533.

In contrast, several courts have upheld provisions of the Uniform Act challenged under the Commerce Clause. In *Underhill Associates v. Bradshaw*, 674 F.2d 293 (4th Cir. 1982), the Fourth Circuit upheld a Virginia registration provision challenged by an out-of-state broker. The court found

that the broker's contacts with Virginia were sufficient to give the state an interest in requiring registration, and that this interest outweighed the minimal burden on the broker of having to register. *Id.* at 295. *Accord, Borthwick v. First Georgetown Securities*, 892 F.2d 178 (2d Cir.1989)(upholding a Connecticut registration provision challenged under the Commerce Clause). Several state courts have also rejected Commerce Clause challenges to provisions of the Uniform Act. *Johnson-Bowles Company, Inc. v. Division of Securities, Dept. of Commerce, State of Utah*, 829 P.2d 101 (Ct. App. Utah), *cert* denied 843 P.2d 516 (1992)(finding that interference with interstate commerce of Division order prohibiting sale of unregistered securities was "merely incidental to the local benefit of preventing the trading of fraudulent stocks, or the trading of otherwise legal stocks in a fraudulent manner."); *Haberman v. Washington Public Power Supply System*, 109 Wash.2d 107, 136, 744 P.2d 1032 (S.Ct. Wash. 1987)("Washington's interest in regulating bond issues by municipal corporations, and in providing a forum for claims arising from those issues outweigh the impact that our application of the [Washington Securities Act] in this case will have on interstate commerce, particularly when considering the substantial relationship between this state and the case in controversy.")

Not only is there no conflict to resolve in the lower courts, there is no issue of substantial importance in this case that requires the involvement of this Court. We have here the ordinary application of settled law within a regulatory scheme designed to promote uniformity and permit complementary regulation by state and federal agencies. No interference with interstate commerce or with Commerce Clause jurisprudence is involved.

As noted earlier, the registration provision challenged here, N.J.S.A. 49:3-60, is New Jersey's version of the registration provision of the Uniform Securities Act. The purpose of the Uniform Act, and the intent of states adopting it, is to promote uniformity in securities regulation and standardization of securities transactions. *See, Cola v. Terzano*, 129 N.J. Super 47, 54 , 322 A.2d 195 (Law Div. 1974) aff'd *sub nom Cola v. Packer*, 156 N.J. Super 77, 383 A.2d 460 (App. Div. 1978). New Jersey's Uniform Law thus represents the antithesis of the "economic Balkanization" the Commerce Clause was intended to prevent. *See*, *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250, (1979).

Moreover, New Jersey's Uniform Law not only harmonizes New Jersey's regulation with that of other states, it fits squarely into the federal/state division of responsibility created by the federal securities statutes. NSMIA specifically preserves the authority of states to "investigate and bring enforcement actions with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions." 15 U.S.C. §77r(c)(1). The Act also preserves the states' ability to require "the filing of any document filed with the Commission pursuant to this subchapter....," 15 U.S.C. §77r(c)(2)(A), which is precisely what is required for "registration by coordination" under the New Jersey statute. N.J.S.A. 49:3-61. Finally, the federal statute provides that "nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." 15 U.S.C. §78bb. Thus, in passing the federal securities statutes, Congress clearly envisioned a system of complementary federal and state regulation. In adopting the

Uniform Securities Act, New Jersey and 34 other states sought to exercise their portion of that regulatory system in a coordinated manner. The provisions challenged are not protectionist measures enacted by one state to gain economic advantage, but coordinated portions of a complex web designed to catch all fraudulent securities practices. As the Third Circuit recognized,

> the established heritage and near universality of the provision that Goldmen has challenged itself underscores its constitutionality. *See, Healy [v. Beer Institute]* 491 U.S. at 336-37, 109 S.Ct. at 2499. Goldmen has challenged a state provision that is an established strand in the legal fabric of securities regulation. The power that Goldmen claims would unduly burden interstate commerce is one that most states have long exercised, and that Congress has for decades expressly allowed to continue. This is not the sort of "parochial" state power that Justice Cardozo warned of in *Baldwin [v. G.A.F. Seelig]* the broad exercise of which "would ... invite a speedy end of our national solidarity." *Baldwin*, 294 U.S. at 523, 55 S.Ct. at 500.
> [Pet. App. 20a.]

As there is no conflict among the lower courts regarding the issues raised by petitioners, and as there is no significant issue requiring this court's intervention, respondent respectfully submits that the petition for *certiorari* should be denied.

II. THE THIRD CIRCUIT'S DECISION THAT NEW JERSEY'S SECURITIES REGISTRATION REQUIREMENT DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE IS CORRECT AND CONSISTENT WITH COMMERCE CLAUSE JURISPRUDENCE

Article I, Section 8 of the Constitution grants Congress the power to regulate interstate commerce. This provision has been interpreted not only to grant such power to Congress, but to prohibit the exercise of authority by the States that discriminates or improperly burdens interstate commerce. This "dormant" Commerce Clause prohibition forms the basis of petitioner's claim that New Jersey's registration requirement is unconstitutional. However, New Jersey's statute is completely consistent with the Federal/State system of regulation that has been established by Congress pursuant to its Commerce Clause jurisdiction. Moreover, the challenged statute does not regulate activity occurring wholly outside New Jersey and does not unduly burden interstate commerce. The decision below, which found the registration requirement consistent with the Commerce Clause, was therefore correct.

The underlying principle behind the dormant Commerce Clause prohibition against discriminatory state action is the prevention of the economic "Balkanization" of the states through regulations that would promote local enterprise at the expense of that from other states or from foreign countries. *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). States are prohibited from using their governmental powers to convey advantages on local merchants or to give local consumers an advantage over consumers in

other states. As noted above, New Jersey's regulatory scheme is designed to do just the opposite. The system is designed to prevent fraud in areas left to state regulation by Congress and to be consistent with other states regulating in the same area.

Application of the tests established by this court to review dormant Commerce Clause challenges also confirm the correctness of the decision below. This court has adopted a two-tiered approach to analyzing state regulation under the Commerce Clause. *Brown-Forman Distillers v. New York State Liquor Authority*, 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986). When a state statute directly regulates or discriminates against interstate commerce, or has the effect of favoring in-state economic interests, the statute is virtually *per se* invalid. *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). By contrast, when a state statute has only indirect effects on interstate commerce and regulates evenhandedly, the analysis must turn upon whether the burden on interstate commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc., supra,* 397 U.S. 137, 142 (1970).

There is no question that Section 60 of New Jersey's Uniform Securities Law does not expressly discriminate against interstate commerce. The statute on its face applies evenhandedly. Petitioner claims, however, that the statute reaches beyond New Jersey's borders to directly regulate out-of-state activity. This Court has held that a state statute has an invalid extraterritorial reach when the practical effect of the law is to regulate commerce "occurring wholly outside" that state's borders. *Healy v. The Beer Institute*, 491 U.S. 324, 332, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989). This standard applies regardless of whether the legislature intended the extraterritorial effect. *Brown-Forman, supra*, 476 U.S. at 579.

Thus, in *Healy*, the Court struck down a Connecticut law requiring brewers and importers of beer to post their prices at the beginning of each month and affirm under oath that the prices were no more than those charged in neighboring states. The brewers and importers were then required to maintain the posted prices for the remainder of the month. The court found that the law had the undeniable effect of controlling the price they could charge for sales conducted that month entirely in the neighboring states. 491 U.S. at 337. In *Brown-Forman*, a similar New York affirmation statute regulating wholesale liquor prices was found to regulate transactions occurring wholly outside of New York. 476 U.S. at 582.

In *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982), the Supreme Court struck down an Illinois tender offer registration statute because its practical effect was to block transactions having no connection with Illinois or Illinois stockholders. In doing so, the Court distinguished the 1917 Blue-Sky Cases which had rejected challenges to blue-sky laws under the Commerce Clause on the basis that blue-sky laws regulate conduct within a state and only incidentally affect interstate commerce. *See Hall v. Geiger-Jones Co.*, 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559, 37 S.Ct. 224, 61 L.Ed. 493 (1917); and *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568, 37 S.Ct. 227, 61 L.Ed. 498 (1917). The Court also specifically noted that the post-Depression federal securities acts expressly acknowledged that the regulatory system encompassed by the state blue-sky laws were not preempted. 457 U.S. at 642.

Here, the Third Circuit correctly distinguished the above cases by finding that New Jersey's regulation did not reach transactions wholly outside its borders. Analogizing to contract law, the Court found that the state where the offer was

made and the state where it was accepted would both have an interest in the transaction. Pet. App. 15a. The Court stated:

> A contract between Goldmen in New Jersey and a buyer in New York does not occur "wholly outside" New Jersey, just as it does not occur "wholly outside" New York. Rather, elements of the transaction occur in each state, and each state has an interest in regulating the aspect of the transaction that occurs within its boundaries.
> [Pet. App. 16a.]

This conclusion is completely consistent with other cases addressing the Commerce Clause limitation on extra-territorial regulation. In *CTS Corporation v. Dynamics Corporation of America*, 481 U.S. 69, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987) this Court upheld an Indiana statute governing tender offers for shares in Indiana corporations. The Court distinguished *Edgar v. MITE*, based on the fact that the Act applied only to Indiana corporations and that Indiana had a "substantial interest in preventing the corporate form from becoming a shield for unfair business dealing." 481 U.S. at 93, 107 *S.Ct.* at 1651. Similarly, in this case, the Third Circuit based its decision on the fact that the regulation applied only to Goldmen's sales of Imatec stock from New Jersey and that New Jersey had a legitimate interest in preventing fraudulent transactions from its state. Pet. App. 16a-18a.

In *Haberman v. Washington Public Power Supply System, supra*, 109 Wash.2d 107, 744 P.2d 1032 (Wash. 1987), the Supreme Court of Washington upheld the application of Washington State's version of the Uniform Securities Act to out-of-state parties. The court noted that "[u]nlike the Illinois statute in *Edgar*, we do not attempt to apply the [Act] to

transactions completely unrelated to Washington." *Id.* at 136. The court also noted that, rather than interfering with interstate commerce, the Act "is intended to be coordinated with related federal regulation." *Id.* The Third Circuit's decision in this case that Section 60 does not impermissibly regulate transactions occurring wholly out-of-state is even supported by *Arizona Corporation Commission v. Media Products*, *supra*, the case relied upon most heavily by petitioner. In that case, the court recognized the distinction between *Edgar* and *CTS* and found a Commerce Clause violation because Arizona had no significant contact with the regulated transactions. 763 P.2d at 533.

Thus, case law in this area is consistent. If a state has an interest in the transaction involved, so that its statute does not reach activities that occur wholly outside its boundaries, the statute does not directly regulate interstate commerce and is not *per se* unconstitutional. Here, the Third Circuit correctly found that the transactions regulated occurred from Goldmen's New Jersey office, and that New Jersey has a legitimate interest in preventing fraudulent transactions from being launched from this state. Thus, the Third Circuit's decision is firmly grounded in established Commerce Clause law.

Petitioner argues that the Third Circuit failed to analyze whether Section 60 violated the Commerce Clause under the balancing test set forth in *Pike v. Bruce Church, supra*, 397 U.S. 137 (1970). That test provides that even where a statute's effect on interstate commerce is merely incidental, it may be illegal if the benefits to the public are outweighed by the burdens on interstate commerce. The outcome of this balancing is clear from the Third Circuit's decision. In this case the benefits unquestionably outweigh the minimal burden on petitioner.

As the Third Circuit found, New Jersey's regulation of sales from the state serves two important public interests. First, "preventing New Jersey companies from offering suspect securities to out-of-state buyers helps preserve the reputation of New Jersey's legitimate securities issuers." Pet. App.17a. Second, the regulation protects New Jersey residents from "dubious" securities that enter the state in the secondary market. Pet. App. 18a. Because there is no registration required for sales on the secondary market, allowing unregistered sales by Goldmen to out-of-state customers does not mean that those securities will not ultimately be sold in New Jersey. As the court below correctly concluded, "New Jersey's most effective means of preventing such an undesirable result would be to block the initial public offering." Pet. App. 19a.

In contrast, the burden on Goldmen is not significant. As noted earlier, the registration process in New Jersey is generally accomplished in one of two ways, depending on the type of security offered and the degree of reliability of the issuer. If a registration statement has been filed with the SEC for a security, it may be registered in New Jersey or any other state requiring registration of that security, "by coordination." Registration by coordination involves filing with the Bureau the same papers that were already filed with the SEC, plus a few additional forms. N.J.S.A. 49:3-61.1. If a security is not subject to federal regulation but is subject to state regulation, the process required is registration "by qualification," which requires preparing and filing a registration statement with the Bureau and waiting until the registration is effective before selling the securities. *N.J.S.A.* 49:3-61.

In this case, since Imatec filed a registration statement with the SEC, it was eligible to register by coordination. Although Goldmen chose instead to withdraw the application

to register Imatec securities, compliance with New Jersey's law would not have been onerous. In the absence of regulatory concern regarding fraud or deceptive practices, registration can be accomplished by filing papers that have already been prepared for the SEC. This burden is not substantial and is closely tailored to the purpose of New Jersey's registration requirement. On balance, preventing fraud that reflects poorly on honest New Jersey businesses and may injure New Jersey residents in the secondary market outweighs the minimal burden of filing a registration statement with the Bureau. The Third Circuit was thus correct and review by this Court is not required.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petition for *certiorari* be denied.

Respectfully submitted,

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